Supreme Court, U. S.
FILED
MAR 13 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-80

GEORGE F. KUGLER, JR., Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, JR., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDN PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, JR., and MARK A. SULLIVAN, of the Supreme Court of New Jersey, and THE STATE OF NEW JERSEY,

Petitioners,

v.

EDWIN H. HELFANT,

Respondent.

REPLY BRIEF OF PETITIONERS

WILLIAM F. HYLAND,
Attorney General of New Jersey,
Attorney for Petitioners,
State House Annex,
Trenton, New Jersey, 08625.

DAVID S. BAIME,
Chief, Appellate Section,
GLENN E. KUSHEL,
Deputy Attorneys General,
Division of Criminal Justice,
Of Counsel and on the Brief.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

TABLE OF CONTENTS

	PAGE
ARGUMENT	2
CONCLUSION	15

Cases Cited

Addonizio, In re, 53 N. J. 107, 248 A. 2d 531 (1968)	10
Allee v. Medrano, —— U. S. ——, 94 S. Ct. 2191 (1974)	12, 13
Bryson v. United States, 396 U. S. 64 (1969)	9
Carroll v. President and Commissioners of Princess Anne, et al., 393 U. S. 175 (1968)	6
Dennis v. United States, 384 U. S. 855 (1966)	9
Division 1287 of the Amalgamated Ass'n of Sheet, Electric Railway and Motor Employees v. Missouri, 374 U. S. 74 (1963)	6
Fenner v. Boykin, 271 U. S. 240 (1926)	6
Glickstein v. United States, 222 U. S. 139 (1911)	9
Hoffman v. United States, 341 U. S. 479 (1951)	9
Malloy v. Hogen, 378 U. S. 1 (1964)	9
Maness v. Meyers, —— U. S. ——, 43 U. S. L. W. 4143 (1975)	13
Miranda v. Arizona, 384 U. S. 436 (1966)	8
Samuels v. Mackell, 401 U. S. 68 (1971)	7
Spomer v. Littleton, —— U. S. ——, 94 S. Ct. 685 (1974)	5

PAGE

State v. Dolce, 41 N. J. 422, 197 A. 2d 185 (1964) 11

Stefanelli v. Minard, 342 U. S. 117 (1951) 6, 13

Steffel v. Thompson, —— U. S. ——, 94 S. Ct. 1209 (1974) 7

United States v. Blue, 384 U. S. 251 (1966) 13

United States v. Kahriger, 345 U. S. 22 (1952) 9

United States v. Knox, 396 U. S. 77 (1968) 9

United States v. Mandujano, 496 F. 2d 1050 (5 Cir. 1974) 11

United States v. Nickels, 502 F. 2d 1173 (7 Cir. 1974) 11

United States v. Russell, 411 U. S. 423 (1973) 11

United States v. Students Chal. Reg. Agcy. Pro. (SCRAP), 412 U. S. 669 (1973) 6

United States v. W. T. Grant Co., 345 U. S. 629 (1953) 6

Younger v. Harris, 401 U. S. 37 (1971) 2, 6, 12, 13

Zwickler v. Koota, 389 U. S. 241 (1967) 7

United States Constitution Cited

Fourth Amendment 13

Fifth Amendment 8-14

New Jersey Constitution Cited

Article 6, Section 2, Paragraph 3 3

Article 6, Section 7, Paragraphs 1, 2 5

PAGE

Statutes Cited

Federal Declaratory Judgment Act 7

N.J.S.A. 2A:1B-1 3

28 U.S.C.:

Sec. 2102 7

Rules Cited

R. 1:12-1 4

R. 1:12-2 4

Other Authority Cited

Borchard, *Declaratory Judgments* (2d ed. 1941):

x-xi 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-80

GEORGE F. KUGLER, JR., Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, JR., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDN PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, JR., and MARK A. SULLIVAN, of the Supreme Court of New Jersey, and THE STATE OF NEW JERSEY,

Petitioners,

v.

EDWIN H. HELFANT,

Respondent.

REPLY BRIEF OF PETITIONERS

Petitioners submit this Reply Brief in response to respondent's answering brief (mislabeled as a reply) and supplemental brief.

ARGUMENT

To place this reply in the proper perspective, a succinct review of both petitioners' and respondent's contentions is imperative. As petitioners demonstrated in their brief on the merits, the Court of Appeals' en banc decision virtually extirpated "Our Federalism." This terribly unfortunate and unjustifiable but still emendable result was based on the following encapsulated analysis.

The majority's opinion was bottomed on its unprecedented conclusion that the "extraordinary circumstances" exception enunciated in *Younger* v. *Harris,* 401 U.S. 37 (1971), constituted a viably distinct ground capable of supporting federal intervention in a pending state criminal prosecution. Assuming the existence of such a separate category, the Court of Appeals erred in finding that this case fell within its purview. If, as the court below stated, the concern was merely with the appearance of impropriety on the part of the New Jersey Supreme Court, such grounds manifestly do not warrant federal intervention.

Alternatively, if the majority opinion is read to mean that the factual involvement of the Supreme Court would destroy the objectivity of the entire State court system in processing respondent's constitutional claims, the decision is clearly incorrect. So interpreted, the court's decision reveals a substantial misunderstanding of the State Supreme Court's constitutional and statutory obligations and the manner in which these duties are discharged. Plainly, there was nothing ominous in the Supreme Court's conference with respondent. The purpose of that informal meeting was to determine whether respondent intended to sit as a municipal court judge during the pendency of the grand jury's investigation into his activi-

ties. Although respondent alleges that this fact is not in the record, it can plainly be inferred by virtue of the constitutional and statutory context within which the Supreme Court functions. As we have pointed out, it is the constitutional duty of the Supreme Court to administer the judicial system and to protect the public from the misbehavior of judges and attorneys. See *Constitution of New Jersey, Article* 6, Section 2, paragraph 3; N.J.S.A. 2A:1B-1, *et seq.* The Court's duty to preserve the appearance as well as the existence of judicial integrity often calls for immediate inquiry into allegations of judicial impropriety. It is consonant with that obligation to determine whether the public interest requires the interim suspension of a judge (or a lawyer). In that regard, it is not extraordinary to solicit the judge's (or the attorney's) view as to whether a suspension would be self-imposed, failing which the Court might, depending upon circumstances, proceed formally to that end. While such inquiries may serve to embarass and even unnerve individual members of the bar, no malevolent purpose can be imputed. The mere fact that the Supreme Court is duty-bound to initiate disciplinary and removal proceedings does not render its members incapable of subsequently adjudicating the merits of related criminal convictions.[1] Further, it is a slur on the entire State judicial

---

[1] Respondent's complaint is barren of any allegation that the procedure employed here was in any sense novel or unusual. Nothing has been presented which would indicate that the Supreme Court's preliminary inquiry was designed to compel respondent to testify. On the contrary, as the record plainly reveals, Judge Moore had previously waived his privilege and had appeared before the grand jury. Nevertheless, the Supreme Court interviewed him to determine whether an interim suspension was necessary on the same day that Helfant's conference took place. Moreover, both

(Footnote continued on following page)

system to presume that an individual judge incapable of remaining impartial would not abide by settled New Jersey practice and disqualify himself. R. 1:12-1 and R. 1:12-2. Simply stated, there is no reason to assume that the State courts do not provide, in appearance and in fact, a

---

(Footnote continued from preceding page)

Helfant and Moore agreed to suspensions following their conferences with the Supreme Court despite the fact that each appeared and testified before the grand jury. These undisputed facts clearly rebut respondent's claim that he waived his Fifth Amendment privilege in order to preserve his status as a municipal court judge.

In any event, nothing in respondent's complaint reveals personal animus on the part of the members of the Supreme Court. This omission is extremely significant. The mere personal involvement of a judge in pretrial or ancillary proceedings does not, by itself, preclude him from fairly adjudicating the propriety of his own decisions. Judges are often required to review their own rulings. Post-trial applications, such as motions for a new trial or for a judgment notwithstanding the verdict, are examples of situations in which judges are required to review their own prior decisions. As we have previously noted, a judicially disciplined mind is able to remain impartial. Therefore, the allegations set forth in respondent's complaint do not support an inference that members of the Supreme Court cannot fairly adjudicate the issues raised in this case.

Equally unpersuasive is respondent's allegation that it was improper for the Attorney General to give the Supreme Court a copy of the grand jury minutes. As we have pointed out, the Supreme Court is duty-bound to initiate removal proceedings. Such a drastic step should not be taken on the basis of mere rumor or conjecture that a judge is unfit or incompetent. Constitutional safeguards are not offended when the Supreme Court requests and receives grand jury minutes in order to determine whether disciplinary proceedings should be commenced. The secrecy of grand jury proceedings is not sacrificed since the transcript is not made public.

proper forum for vindication of respondent's constitutional claim.[2]

Even assuming the wholesale contamination of New Jersey's judicial system, the court below nevertheless

---

[2] It is significant that only two of the six justices who attended the meeting with respondent are presently members of the New Jersey Supreme Court (Justice Sullivan and Justice Mountain). It is also noteworthy that only one of the two justices remaining on the Supreme Court was, in any sense, active in the interrogation of respondent. Further, it bears repeating that the present Chief Justice (Chief Justice Hughes) was not a member of the Supreme Court at the time of the meeting. Plainly, he has no interest in this matter and cannot be said to be biased against Helfant. This fact is critical since the Chief Justice, and not other members of the Supreme Court, is the "administrative head" of New Jersey's judicial system and is solely responsible for transferring judges from one assignment to another. *Constitution of New Jersey*, Article 6, Section VII, par. 1 and 2. Thus, even were we to assume that former Chief Justice Weintraub was biased against respondent and would have committed the crime of misconduct in office by using his judicial powers to insure Helfant's conviction, a grossly unwarranted assumption, the complaint here does not set forth a claim for which relief can be granted.

Not only has the composition of the Supreme Court changed, a new Attorney General was appointed in January 1974. Strange indeed is the fact that respondent has not sought to substitute the real parties in interest for those named in the complaint. In any event, it is clear that respondent's unsupported claim of bias and collusion cannot be said to taint the present Chief Justice, or the four recently appointed associate justices, or the present Attorney General or any of his assistants. See *Spomer* v. *Littleton*, —— U.S. ——, ——, 94 S.Ct. 685, 689-690 (1974). Therefore, no live controversy exists with respect to all of the

(Footnote continued on following page)

erred. Respondent's complaint failed to allege a constitutional injury that was "both great and immediate." See *Younger* v. *Harris, supra* at 46. A crucial aspect of *Younger's* limitation upon incursions into state proceedings has thus not been satisfied. The equity jurisdiction of the federal courts may not be invoked to permit a flanking movement against the system of state courts. See *Stefanelli* v. *Minard*, 342 U.S. 117 (1951); *Fenner* v. *Boykin*, 271 U.S. 240 (1926).

It bears repeating that federal interference in a state criminal prosecution may be sanctioned, if at all, only when the alleged unconstitutional injury sought to be averted will be "both great and immediate." *Younger* v. *Harris, supra* at 46. See also *Fenner* v. *Boykin, supra* at 243. The equitable principle that harm must be imminent before an injunction or other form or relief will issue is an integral part of the doctrine of federal non-

---

(Footnote continued from preceding page)

petitioners except Justice Mountain and Justice Sullivan. Under these circumstances, respondent has not shown that the purpose of an injunction (or in this case declaratory relief), which is to prevent future violations (see *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 634 (1953)), would be served in this case. Nor has he alleged facts disclosing that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep this case alive. See *Carroll* v. *President and Commissioners of Princess Anne, et al.*, 393 U.S. 175, 179 (1968); *Division 1287 of the Amalgamated Ass'n of Sheet, Electric Railway and Motor Employees* v. *Missouri*, 374 U.S. 74, 78 (1963). Rather, respondent's pleadings are nothing more than an "academic exercise in the conceivable." *United States* v. *Students Chal. Reg. Agcy. Pro. (SCRAP)*, 412 U.S. 669, 672 (1973).

intrusion.[3] Principles of comity and federalism dictate that only in the most extraordinary circumstances is a

---

[3] As noted in our brief on the merits, Federal declaratory relief when a prosecution is pending in the state courts is generally inappropriate. See *Samuels* v. *Mackell*, 401 U.S. 68 (1971). In cases where the state criminal prosecution was begun prior to the federal suit, "the same equitable principles relevant to the propriety of an injunction must be taken into consideration by federal district courts in determining whether to issue a declaratory judgment. . . ." *Id.* at 73. In unusual cases, "different considerations" may enter into a federal court's decisions as to declaratory relief, on the one hand, and injunctive relief on the other." *(Zwickler* v. *Koota*, 389 U.S. 241, 252 (1967).) But, under the facts in this case, the metes and bounds of both remedies are coterminous.

In this case, a declaratory judgment would be as abrasive as the injunctive remedy for a variety of reasons. First, under 28 U.S.C. §2102, respondent could enforce a declaratory judgment by requesting an injunction and thus disrupt the State proceedings. See *Steffel* v. *Thompson*, —— U.S. ——, 94 S.Ct. 1209, 1221 (1974). Second, the federal court judgment may have some *res judicata* effect, though this point is not free from difficulty. *Ibid.* Third, if the parties would not be bound by the federal judgment, declaratory relief would encourage duplicative judicial proceedings. Fourth, declaratory relief would reflect negatively on the State's ability to enforce constitutional principles. Fifth, the evidentiary hearing and possible appeals emanating from the resulting declaratory judgment would greatly disrupt the State's criminal proceedings. Finally, since petitioners have stipulated that respondent's testimony will not be used in the State criminal trial, none of the parties must act at his peril in the future. Respondent is not relegated to the option of violating the law to test the constitutionality of a statute as is usually the case when declaratory relief is sought. See E. Borchard, *Declaratory Judgments*, x-xi (2d ed. 1941). So too, petitioners will not be forced to act at their peril in determining whether to admit respondent's testimony. No such dilemma is presented since all parties agree that New Jersey's rules of evidence would preclude the admission of such testimony in any event. Thus, the issuance of declaratory relief in this case would be contrary to the express purpose of the Federal Declaratory Judgment Act, which was to provide a less abrasive alternative to the injunction remedy.

federal court warranted in transcending the imprecise boundaries that separate two co-equal judiciaries; this because there is no reason to assume that the state courts have less regard for the Constitution than their federal counterparts. Thus, the drastic remedy of federal equitable intervention in an ongoing state criminal prosecution should be afforded only on the plainest and clearest of grounds. Yet, the majority opinion is grounded solely upon conclusory allegations which fail to state any injury, much less one that is great or immediate. Repondent has not yet suffered any deprivation of his constitutional rights for which a remedy is available in the federal courts. Indeed, there is no reasonable prospect that he ever will.

Succinctly stated, respondent has not shown that the State court system will ever be confronted with the problem of reviewing the conduct of the Supreme Court or its effect upon Helfant's mental processes. There was no allegation in the complaint of any conduct on the part of the Supreme Court which could sustain a finding of coercion not to plead the Fifth Amendment. Specifically, the complaint is barren of any allegation that respondent's waiver of his privilege against self-incrimination was the product of governmental misconduct or misbehavior. What must be stressed is that we are not dealing with a Fifth Amendment claim in a due process sense, but with a procedure recognized and established through State constitutional and statutory law. That lawful investigatory conduct may possess a "compelling atmosphere" (*cf. Miranda* v. *Arizona*, 384 U.S. 436, 466 (1966)), or create a "Hobson's choice" for an individual does not necessarily render the procedure violative of due process. *Id.* at 467. Thus, no legitimate question as to coercion has been presented.

Even if there was a triable issue as to coercion, there is no basis to say that a finding in favor of respondent would avail him of anything. If respondent was coerced into testifying, that would in no sense provide him with a license to lie with impunity. It is well settled that perjury cannot be self-incriminatory, since the scope of the Fifth Amendment privilege extends only to past criminal conduct. *Glickstein* v. *United States,* 222 U.S. 139, 141 (1911). See also *United States* v. *Knox,* 396 U.S. 77, 82 (1968); *Bryson* v. *United States,* 396 U.S. 64 (1969); *Dennis* v. *United States,* 384 U.S. 855 (1966); *United States* v. *Kahriger,* 345 U.S. 22, 32 (1952). Assuming coercion, the compulsion was not to testify falsely, but to testify truthfully. Any other rule would reduce a witness' oath to a meaningless shibboleth. Hence, a finding of coercion would not affect trial on those counts in the indictment charging respondent with false swearing.

Moreover, under federal constitutional law this Court has held that a witness who is in reality a target of a grand jury investigation can be compelled to testify unless the Court finds that his testimony would be directly inculpatory or provide a link in the chain of evidence that could lead to prosecution for past indiscretions. *Hoffman* v. *United States,* 341 U.S. 479, 485-87 (1951); *Malloy* v. *Hogen,* 378 U.S. 1, 11-14 (1964). In measuring a claim of privilege, this Court has promulgated the following standard:

> The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not establish that hazard of incrimination. It is for the court to say whether his silence is justified, . . . and to require him to answer if it clearly appears to the court that he is mistaken. [*Hoffman* v. *United States,* 341 U.S. at 486, citations omitted]

Although New Jersey law permits a "target" witness to invoke the Fifth Amendment without requiring him to show that his claim is justified (see *In re Addonizio*, 53 N.J. 107, 117, 248 A.2d 531, 536 (1968)), such a witness may not refuse to testify for other nongermane reasons. In other words, a "target" witness in New Jersey may invoke the Fifth Amendment without explication. However, even in New Jersey, a witness who volunteers that his refusal to testify is based on other than valid Fifth Amendment considerations can be compelled to respond to a grand jury's question. A "target" witness cannot, for example, refuse to testify because he fears political retribution, social condemnation or financial injury. Accordingly, in light of Helfant's consummately exculpatory grand jury testimony and his assertion that his desire not to testify was based on reasons other than fear of self-incrimination, it is beyond cavil that respondent, as a grand jury witness, could have been compelled to so testify. Consequently, Helfant's assertion of a putative Fifth Amendment privilege to remain silent is plainly spurious.

Respondent's statements in his briefs make it abundantly clear that any assertion of the Fifth Amendment privilege would have been unwarranted. Respondent does not claim that his testimony before the grand jury was incriminatory or provided a link in the chain of evidence leading to his prosecution for past indiscretions. On the contrary, his testimony could only reflect negatively upon the institution of criminal charges against him. Rather, he claims that he did not wish to testify because other witnesses had previously testified against him and if his testimony were disbelieved by the grand jury, he could be indicted for false swearing. Distilled to its essence, respondent does not rely upon his Fifth Amendment privilege. His decision not to testify was tactical in nature and based upon his fear that the grand jury would not

find his testimony credible. Such a dilemma is always present when an interested party testifies in judicial proceedings.[4] In no sense does such a fear support invocation of the Fifth Amendment privilege.

---

[4] Respondent's claim is couched in the verbiage of an "entrapment" defense. Specifically he contends that there was entrapment when the Attorney General summoned him before the grand jury. As we noted in our brief, this issue is not properly before this Court. The complaint did not make this allegation nor was such a charge advanced or accepted by either the district court or the Third Circuit. Further, we question both the validity of the Fifth Circuit's holding in *United States* v. *Mandujano*, 496 F.2d 1050 (5 Cir. 1974), heavily relied upon by respondent, and its applicability to the facts presented in this case. Here, the facts alleged in the complaint reveal in stark terms that the decision to subpoena respondent was made in good faith for purposes other than a desire to indict him for false swearing. As we noted in our brief, Judge Moore's testimony conflicted with that of his clerk. It was possible that this conflict could have been resolved by respondent's testimony. Further, as respondent concedes, other matters were before the grand jury (*i.e.*, the possible involvement of an Atlantic County judge in an unrelated transaction). In any event, we submit that *Mandujano* was erroneously decided and point to decisions in other circuits which have rejected the entrapment rationale. See, *e.g.*, *United States* v. *Nickels*, 502 F.2d 1173 (7 Cir. 1974). More importantly, the defense of entrapment is not of constitutional dimension, *United States* v. *Russell*, 411 U.S. 423, 432 (1973), and would constitute a question of fact for the jury if litigated in a New Jersey forum. See *State* v. *Dolce*, 41 N.J. 422, 197 A.2d 185 (1964). Thus, even if "contaminated" by virtue of the Supreme Court's involvement in Helfant's disciplinary proceedings, the State court system will never be confronted with having to resolve the issue. Finally, it is to be observed that the focus of Helfant's attack is upon the Attorney General, not upon the Supreme Court. Thus, there is no reason to assume that the State judiciary cannot fairly adjudicate the issue. In any event, the respondent's claim would in no sense affect the substantive counts of the indictment. See *United States* v. *Mandujano, supra* at 1052.

With respect to the substantive charges, it must be repeated that respondent's testimony before the grand jury was not incriminatory. Therefore, there is little likelihood that his statements will be used against him at trial. In point of fact, no evidentiary doctrine in New Jersey would support admission of respondent's testimony as substantive evidence. Equally important is the Attorney General's stipulation before the Court of Appeals that he would not seek introduction of respondent's grand jury testimony as substantive evidence. That being the case, any constitutional harm alleged in Helfant's complaint is purely hypothetical, and certainly does not qualify as "great and immediate."

In sum, what becomes apparent is that the respondent's claims need never be presented during the trial on the State indictment. Assuming the allegations of the complaint are true, respondent has suffered no harm in the *Younger* sense with respect to the criminal prosecution and in fact, no harm at all. In short, his claimed Fifth Amendment violation is spurious and has no relevance to the State prosecution.

Helfant responded to the foregoing analysis with an effete and familiar panoply of arguments. Indeed, petitioners succeeded in anticipating and refuting them in their brief (Pb72 to 79). Four new makeweight contentions however, are worthy of mention because their elucidation reaffirms petitioners' position.

First, respondent, by eclectically editing Chief Justice Burger's concurring opinion in *Allee* v. *Medrano*, —— U.S. ——, 94 S.Ct. 2191 (1974), asserts that his factual analysis demonstrates "a breakdown of the State judicial system" constituting "extraordinary circumstances" and

warranting federal intervention in a pending State Court prosecution (Rb34 to 36).[5] Helfant, however, has failed to note that to satisfy the *Younger* test, the federal plaintiff must prove both bad faith and requisite injury; that is, he must unequivocally demonstrate deliberate bad faith action by the prosecutorial authorities, to unfairly deprive a person of a reasonable and adequate opportunity to make application in the state courts for vindication of his constitutional rights. *Allee* v. *Medrano*, 94 S.Ct. at 2210. Dispositively, as the court below found, there was no bad faith (Rb65). Absent the *sine qua non* of bad faith—the linchpin of federal intervention—Helfant's ill-founded contentions disintegrate.

Second, Helfant, in attempting to avoid the non-justiciable character of the coercion issue, analogizes his alleged Fifth Amendment injury to harm resulting from a Fourth Amendment violation (Ab58). What respondent chooses to ignore, however, is that the remedy for an unreasonable search and seizure is not federal intervention in an ongoing State prosecution (see *Stefanelli* v. *Minard*, 342 U.S. 117 (1951)), but exclusion of the tainted evidence. Accordingly, suppression of the allegedly coerced grand jury testimony at trial would provide respondent with a complete remedy. *United States* v. *Blue*, 384 U.S. 251, 255 (1966).

Third, in a supplemental brief, Helfant, relying on the recent case of *Maness* v. *Meyers*, —— U.S. ——, 43 U.S. L.W. 4143 (1975), tries to circumvent the suppression remedy prescribed in *Blue* by arguing that "[w]hen he was coerced by the New Jersey Supreme Court to waive his Fifth Amendment privilege the cat was out of the bag" and that "nothing could undo this damage." (Sb4 to

---

[5] Respondent's brief.

5).[6] Accordingly, petitioners are again constrained to note that Helfant's grand jury testimony was wholly non-incriminatory—neither feline freedom nor the need of undoing the undone is at issue in the case *sub judice*.

Finally, respondent has impugned the integrity of petitioners' appellate counsel in an answering brief improperly designated as a reply. In a purely *ad hominem* attack, redolent with self-righteous indignation, Helfant, without a scintilla of justification, has accused counsel for the State of prosecutorial misconduct in misrepresenting the factual basis of petitioners' position.

It bears repeating that Helfant conveniently ignored the unassailable fact that petitioners' factual analysis was predicated on the record below, judicially noticeable records and rules of the New Jersey Supreme Court, and ineluctable inferences which could be properly drawn therefrom. Apparently, any reasonable conclusion contrary to Helfant's confounded farrago of fallacies is automatically *de hors* the record.

In any event, respondent's unjustified attack would warrant no reply but for the undeniable fact that he has committed the very unethical gaucherie of which he accuses petitioners' counsel. Under these unpalatable circumstances, petitioners must reply.

As Helfant proudly proclaims in his answering brief,[7]

> What is the record below? Basically, it is the complaint, the testimony taken in the district court and an affidavit of Samuel Moore, a now deceased codefendant. [Rb3]

---

[6] Respondent's supplemental brief.

[7] Respondent's reply brief.

Respondent's description seeks to avoid the painful fact that Samuel Moore's affidavit is not part of the record in this case. Helfant gratuitously foisted this document on petitioners via his Court of Appeals' brief. Although petitioners promptly moved to strike the affidavit, the court below never passed on the motion.

Nevertheless, the irrefragable fact remains that Helfant himself has succeeded in proffering factual material *de hors* the record. Yet respondent unjustifiably accuses petitioners of perpetrating the very malfeasance which he has consummated.

CONCLUSION

That part of the opinion of the United States Court of Appeals for the Third Circuit denying injunctive relief should be affirmed and the judgment permitting federal intervention and requiring a hearing and declaratory relief should be reversed.

Respectfully submitted,

WILLIAM F. HYLAND,
Attorney General of New Jersey,
Attorney for Petitioners.

DAVID S. BAIME,
Chief, Appellate Section,
GLENN E. KUSHEL,
Deputy Attorneys General,
Division of Criminal Justice,
Of Counsel and on the Brief.